

(9) MAY 9 1945

CHARLES ELMORE GROOM

In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1944

No. 1252

THE TEXAS AND PACIFIC RAILWAY COMPANY,  
*Petitioner,*  
*v.*

MRS. G. J. RILEY, ADMINISTRATRIX OF THE ESTATE OF  
G. J. RILEY, DECEASED,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CIVIL APPEALS FOR THE SIXTH SU-  
PREME JUDICIAL DISTRICT OF TEXAS AT TEX-  
ARKANA AND BRIEF IN SUPPORT THEREOF.**

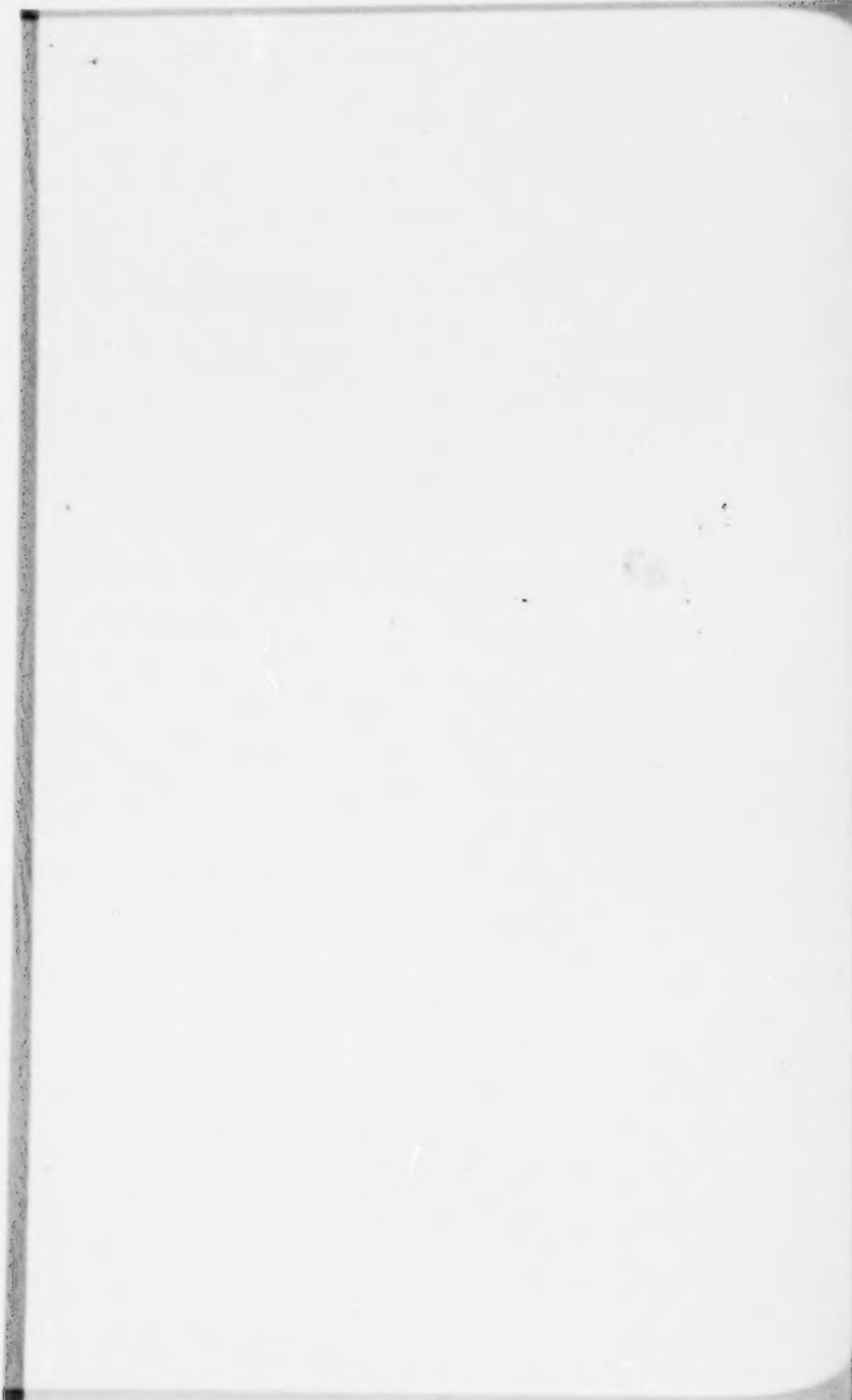
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Building,  
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ROBERTSON, LEACHMAN, PAYNE,  
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**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CIVIL APPEALS FOR THE SIXTH  
SUPREME JUDICIAL DISTRICT OF TEXAS AT  
TEXARKANA.**

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*To the Honorable Supreme Court of the United States:*

NOW COMES The Texas and Pacific Railway Company petitioner, and prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas (the highest court of the State of Texas in which a decision could be had), affirming the judgment of the Fifth Judicial District Court of Cass County, Texas, for Thirty Thousand and No/100 (\$30,000.00) Dollars, in favor of Mrs. G. J. Riley, Administratrix of the Estate of G. J. Riley, deceased, for the benefit of herself as widow

and of the three minor children of G. J. Riley, deceased, for the death of G. J. Riley, brought under the Federal Employers' Liability Act and petitioner respectfully shows:

### **SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED**

Respondent brought this suit under the Federal Employers' Liability Act, Section 51, of Title 45, U. S. C., for the benefit of herself as surviving widow and Mamie Louise Riley, age 12, Evelyn Riley, age 10, and Robert Walyn Riley, age 6, surviving minor children of G. J. Riley, deceased, against petitioner in the State District Court of Cass County, Texas, for damages resulting from the death of G. J. Riley, who received fatal injuries while in the course of his employment by petitioner railroad company in the furtherance of interstate commerce, alleging that petitioner was guilty of certain specific acts of negligence proximately causing such death. (R. 1-5.) Petitioner entered a general denial and further pleaded that Riley's own negligence was the sole proximate cause of his death; that the negligence of Riley proximately contributed to cause his death and in the alternative that the death of Riley did not result from negligence upon the part of either Riley or petitioner but was an unavoidable accident. (R. 5-7.) The evidence consisted of the testimony of the Bridge and Building crew working with Riley at the time of his death. Such testimony appears in question and answer form on Pages 65 to 126, both inclusive, of the Record, and is accurately narrated on Pages 152 to 174 of Appendix to Petitioner's Brief in support of this petition. Such fully

developed and uncontroverted evidence shows that Riley was the most experienced member of the Bridge and Building gang (R. 86, 105, 113-4, 118), engaged in unloading a carload of piling ranging from 12 to 18 inches in diameter and from 30 to 45 feet long (R. 70) to be used in building a bridge on petitioner's main line near Cypress, Louisiana (R. 71) and were 54 piling loaded on a flat car (R. 72), spotted at the point where the piling were needed on a dump some eight or ten feet high. (R. 72.) The longer piling were on the bottom and so on up. (R. 89.) The piling were held in place on the flat car by means of seven stakes or standards about four inches in diameter inserted in iron loops, buckets or sockets on each side of the car and were fastened together by wires drawn between opposite stakes at intervals from the top to the bottom (R. 69, 84), the car containing the piling was stopped where the piling were needed. (R. 72.) The usual manner of unloading was to remove all but the end stakes on one side and weaken them near the bottom and remove all wires except the wires between the two end stakes at each end of the car and then cut the last two wires and let the weight of the piling break the last two weakened stakes, which would ordinarily cause the piling to fall off the weakened side. (R. 85, 106.) This is the way the loading was undertaken on the occasion in question (R. 74-7, 86, 106), and no one of the experienced employees on the job anticipated anything unusual. (R. 92.) The load was so even that at first the crew thought it leaned a little to the north but upon further deliberation, decided it leaned a little to the south and so they decided to unload on the south side by removing

the inside stakes and weakening the two end stakes on the south side. (R. 86, 96.) Riley actively participated in such decision (R. 86, 96, 105-6, 112, 113-4) and in the removal of the inside stakes and the weakening of the two end stakes on the south side, which was done in the customary manner (R. 106), and then climbed up on the car to cut the remaining top wire between the two end stakes at the west end of the car with an axe. (R. 89.) When G. J. Riley cut such wire, the wire between the two end stakes on the east end broke (R. 92), the load divided and all the stakes on both the north and south sides gave way and the load split or burst and the piling went both ways, some of the piling fell off the north side and some off the south side of the car and Riley either jumped or was thrown to the north side of the car and was crushed to death by the piling which fell on the north side. (R. 77-9, 104, 112, 117.) None of the experienced Bridge and Building crew had ever seen a load fall on both sides when the first wire was cut (R. 92, 95, 108), although one had seen one load of piling fall off the weakened side when only one wire was cut (R. 76), and one witness had seen a load fall off both sides when both wires were cut. (R. 91, 95.) The falling on both sides when only one wire was cut was wholly unexpected and unforeseeable and there was no reason to expect the piling to go off on the north side. (R. 92, 106.)

The case was tried before a jury and at the conclusion of the evidence, petitioner made a motion for an instructed verdict in its favor, which the trial court overruled (R. 7-9), and the case was submitted to the jury on special is-

sues in accordance with the common practice in the State of Texas. (R. 9 to 15.) The jury found in response to special issues submitted that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of the defendant other than deceased so as to cause the entire load of piling to give way when the deceased Riley cut the wire at the west end of the car; that the car of piling was overloaded at the time the crew under Mr. Waters attempted to unload the same; that the defendant failed to furnish the deceased a reasonably safe place to work under the conditions existing; and that each of said acts or omissions constituted negligence and a proximate cause of Riley's death. (R. 10-12.) The jury further found that Riley was not guilty of contributory negligence (R. 12-13); that the death of Riley was not the result of an unavoidable accident (R. 13) and apportioned the damages as follows:

To Mrs. G. J. Riley .....	\$15,000.00
To Mamie Larice Riley .....	5,000.00
To Evelyn Marie Riley .....	5,000.00
To Robert Waylin Riley .....	5,000.00

(R. 14.)

Petitioner made a motion for judgment non obstante veredicto, which was overruled (R. 25-33) and respondent filed a motion for judgment on the verdict (R. 60) which was sustained and judgment was rendered on the verdict in favor of respondent against petitioner for Thirty Thousand and No/100 (\$30,000.00) Dollars, apportioned as above and for all costs of suit. (R. 61-62.)

Petitioner duly perfected its appeal from such judgment to the Court of Civil Appeals for the Sixth Supreme Ju-

dicial District of Texas at Texarkana, Texas, which affirmed the judgment of the trial court (R. 136), holding in its written opinion that there was no evidence to support the findings of the jury that petitioner was negligent in overloading the car, and that such negligence was a proximate cause of Riley's death, but further holding that aided by the *res ipsa loquitur* rule of evidence, from the mere happening of the accident, the circumstances did support the jury findings that petitioner was negligent, in that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant other than deceased so as to cause the entire load of piling to give way when the deceased Riley cut the wire at the west end of the car, and in failing to furnish the deceased a reasonably safe place to work under the conditions existing, and that such negligence was a proximate cause of Riley's death and that the Thirty Thousand and No /100 (\$30,000.00) Dollar judgment was not excessive, although more than twice the amount Riley would have earned during his life expectancy, considering the value of the services Riley might have rendered in training and educating his children. (R. 127-137.)

Petitioner duly filed a motion for rehearing in the Court of Civil Appeals (Appendix to Petitioner's Brief, pp. 119-145), which was overruled (R. 137) and duly filed its application for a writ of error to the Supreme Court of Texas (Appendix to Petitioner's Brief, pp. 147-221), which was refused by the Supreme Court of Texas, with the docket no-

tation "Refused for want of merit,"\* (R. 137), and petitioner duly filed a motion for rehearing of its application for writ of error (Appendix to Petitioner's Brief, pp. 235-246), which was overruled by the Supreme Court of the State of Texas on March 7, 1945 (R. 138), whereby the judgment of said Court of Civil Appeals became a final judgment rendered by the highest court of Texas in which a decision could be had†, and where is drawn in question some right, privilege or immunity under the Federal Employers' Liability Act of which petitioner has been unjustly denied clearly to its prejudice and this application is being duly filed in order that justice may be done.

#### **STATEMENT OF BASIS FOR JURISDICTION**

1. The jurisdiction of this Honorable Court is based upon Paragraph (b) of Section 344, Title 28, United States Code (Judicial Code Section 237, Amended), which provides:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had \* \* \* where any title, right, privilege or immunity is specially set up or claimed by either party under the Con-

\* Rule 483 of the Texas Rules of Civil Procedure provides in part in reference to a refusal by the Supreme Court of Texas for an application for a writ of error: "In all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it will refuse the application with the docket notation 'Refused for want of merit'."

† *Chesapeake & O. R. Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157.

stitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

and is also based upon Paragraph (a) of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States, which provides that this Honorable Court may review a case on writ of certiorari "(a) Where a state court has decided a Federal question of substance \* \* \* in a way probably not in accord with applicable decisions of this court."

2. In holding petitioner liable to respondent for Thirty Thousand and No/100 (\$30,000.00) Dollars under the Federal Employers' Liability Act for injuries resulting in the death of petitioner's employee, Riley, under Section 51, of Title 45, U. S. C., where there was no proof of any alleged specific negligence of petitioner and no proof of any negligence that could have been a proximate cause of the injuries, on the doctrine of res ipsa loquitur, on a mere scintilla of evidence, on surmise, speculation and conjecture, and on circumstances supporting other just as plausible conclusions, where the uncontroverted evidence showed that the negligence, if any, was that of deceased himself, and where the amount of damages exceeded the deceased's earning capacity during the remainder of his life expectancy, the Court of Civil Appeals (which was the highest court of the State of Texas in which a decision could be had in this case where the Supreme Court of Texas refused for want of merit an application to it for a writ of

error) has denied to petitioner rights claimed by it under said United States statutes, and has decided Federal questions of substance in conflict with the applicable decisions of this Honorable Court and of the Federal Circuit Courts of Appeal. In view of the erroneous application by the state court of the Federal statutes to the facts of this case, both with respect to the conditions of liability and the measure of damages, this Honorable Court most certainly has jurisdiction to review such erroneous holdings of the state court. A copy of the opinion delivered by the Court of Civil Appeals upon rendering the judgment sought to be reviewed appears on Pages 127-136 of the Record and is hereby appended hereto by reference.

3. There are numerous cases sustaining the jurisdiction of this Honorable Court to grant a petition for a writ of certiorari and review a decision of a state court under the Federal Employers' Liability Act where the evidence is insufficient to support the judgment of the state court and where such state court has held differently from the holdings of this Honorable Court as to liability and the measure of damages under such Federal statutes, and petitioner will cite only a few of such pertinent cases which clearly confer jurisdiction upon this Honorable Court:

The case of *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; 49 S. Ct. 210; 73 L. Ed. 601, holds that on writ of certiorari to review judgment of state court for death of railroad employee under the Federal Employers' Liability Act, if record shows, under applicable principles of law as interpreted by Federal courts, that evidence was not sufficient in kind or amount to warrant a finding that

the railroad's negligence was the cause of the death, the judgment must be reversed.

The case of *Chesapeake & O. R. Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45; 76 L. Ed. 157, holds that where any court fails to accept the United States Supreme Court's interpretation in a case governed by the Federal Employers' Liability Act, the United States Supreme Court will determine and apply the proper remedy.

The case of *Willis v. Pennsylvania R. Co.*, 122 F. (2d) 248, certiorari denied, 314 U. S. 684, holds that whether evidence of negligence is sufficient for jury is determined by Federal rather than State decisions.

The case of *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, holds that the Federal Employers' Liability Act applies to cases where there is no cause of negligence for which carrier is responsible, as well as to those in which liability is imposed, and in both cases, such act is exclusive of state regulations.

The case of *Brady v. Southern Ry. Co.*, 320 U. S. 476; 64 S. Ct. 232, 88 L. Ed. 189, holds that under the Federal Employers' Liability Act the sufficiency of evidence of negligence must be determined by this Honorable Court finally as the sufficiency of the evidence to support a finding of a Federal right to recover is a Federal question and there must be more than a scintilla of evidence before the case may be properly left to the discretion of the jury, that bare possibility is not sufficient and events too remote to require reasonable provision need not be anticipated, and when the evidence is such that without weighing the credi-

bility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict, and by such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

The case of *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578, holds that the Federal Employers' Liability Act permits recovery on the basis of negligence only, and that the burden is on a plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured and that injuries resulted therefrom.

The case of *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U. S. 587, 49 S. Ct. 442, 73 L. Ed. 861, holds that the language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act.

The case of *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896, holds that employer's negligence must cause injury to authorize recovery, and that jury can not be permitted to speculate as to cause of employee's death in action against employer.

The case of *Union Pac. R. Co. v. Huxoll*, 245 U. S. 535, 38 S. Ct. 187, 62 L. Ed. 455, holds that it is proper for the United States Supreme Court to examine the evidence in the record to determine the validity of the claim under

the Federal Employers' Liability Act where such evidence relates to the only negligence claimed in the case, for the reason that it presents a Federal question, not of fact but of law.

The case of *Brennan v. Baltimore & O. R. Co.*, 115 F. (2d) 555, certiorari denied, 312 U. S. 685, holds that an employee must produce substantial evidence of negligence and can not base his case upon mere speculation.

The case of *Western & Atlantic R. R. v. Hughes*, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473, holds that the scintilla rule can not be applied by a state court in an action under the Federal Employers' Liability Act as the Federal rule as to the quantum of proof necessary to go to the jury is controlling.

The case of *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361, holds that it is not sufficient to show that the employer may have been guilty of negligence and where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury for some of which the employer is not responsible, it is not for the jury to guess between these half dozen causes and find that the negligence of employer was the real cause, and if employee is unable to adduce sufficient evidence to show negligence, it is only one case in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim justifies a departure from such rule.

The case of *Entsminger v. Yazoo & Mississippi Valley R. Co.*, 142 F. (2d) 592, holds that under an identical state

of facts presented in the case at bar, where the customary manner of loading the car with logs was complied with an instructed verdict in favor of defendant was proper under the Federal rule.

The cases of *Southern Ry. Co. v. Edwards*, 44 F. (2d) 526, and *Anderson v. Southern Ry. Co.*, 20 F. (2d) 71, hold that the man who cut the wire holding a load of poles is guilty of contributory negligence as a matter of law.

The case of *Chesapeake & O. Ry. Co. v. Kelly*, 241 U. S. 485, 36 S. Ct. 630, 60 L. Ed. 1016, holds that the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act, it must be settled according to the general principles of law as administered by the Federal courts.

The case of *Sabine Towing Co. v. Brennan*, 85 F. (2d) 478, holds that 6% is a just and reasonable rate of interest in determining the amount of money that capitalized at such rate would yield annually the same income that the injured person might have expected from the deceased, using the interest and part of the capital from year to year, and that such method is the proper one by which to measure the compensation for deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.

**4. The judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana became final fifteen days after March 7, 1945, when the Supreme Court of Texas overruled petitioner's motion for**

rehearing of its application for a writ of error, and this petition for a writ of certiorari, the record and supporting brief are being filed in this Honorable Court well within three months after the entry of such judgment as allowed by U. S. Code, Title 28, Section 350. There can be no serious contention that this Honorable Court does not have jurisdiction to correct such erroneous judgment of the state court in this action brought under the Federal Employers' Liability Act.

#### **QUESTIONS PRESENTED**

1. Whether there is any evidence that petitioner was guilty of the specific negligence alleged proximately causing the death of Riley.
2. Whether the doctrine of res ipsa loquitur is applicable where specific acts of negligence are relied upon, where the facts are fully developed and where the instrumentality causing the injury was partially under the control of the injured person, and where such ground of recovery was waived under the local court rules.
3. Whether the negligence, if any, was that of the person receiving the injury.
4. Whether Thirty Thousand and No/100 (\$30,000.00) Dollars was an excessive amount of damages when greatly in excess of the deceased's prospective earnings and capable of producing more income than deceased could have earned.

#### **REASONS RELIED ON FOR ALLOWANCE OF WRIT**

The holding of the Court of Civil Appeals that in the absence of any direct evidence of negligence the doctrine

of res ipsa loquitur could be invoked to support the jury findings that stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant, other than deceased, so as to cause the entire load of piling to give way when the deceased Riley cut the wire at the west end of the car and that defendant failed to furnish the deceased a reasonably safe place to work under the conditions existing, that same constituted negligence and proximate causes of Riley's death, is contrary to the holdings of this Honorable Court and the various Circuit Courts of Appeal (and the Federal construction of the Federal Employers' Liability Act is binding on the state courts) in numerous cases, and deprived petitioner of its valuable rights under such United States statute.

There is no evidence as to who cut the end stakes on the south side of the car, or how deep they were cut. Cutting such stakes too deep on the south side could not possibly have caused the stakes on the north side of the car to give way. An immutable law of physics is that greater weakening of the stakes on the south side correspondingly strengthened the stakes on the north side. *The Court of Civil Appeals can not repeal such natural law.* Therefore, the extent of the cutting of the stakes on the south side (even if respondent had proved that they were cut too deep by an employee of petitioner, which she wholly failed to do) could not possibly have been a proximate cause of the stakes on the north side breaking and letting the piling roll off the north side and fall on Riley, and it was the stakes falling on the north side that caused Riley's death. None of the experienced employees on the job had ever seen such a load

split and fall on both sides of the car when only one wire was cut, and such result was not foreseeable.

Neither is there any evidence of failure to furnish a reasonably safe place to work. Nothing was shown to have been done or left undone to render the place of work any more unsafe than the very danger inherent in the work rendered it. The place of work was necessarily up on the car in order to cut the wires as they were ordinarily cut with safety. No slick place, rough place or faulty appliance on the car of any nature whatsoever was shown. The unexpected falling of the piling to the north was what caused the injuries to Riley and it would have made no difference if he had had a net to jump into or a feather bed to jump onto, as the piling falling off the car on top of him caused the injuries, and nothing about the place of work caused part of the piling to roll off the north side and injure Riley. Therefore, there was no proof of failing to furnish a safe place to work, and even if there had been such failure, it could not possibly have been the proximate cause of the piling unexpectedly falling off the north side of the car and injuring Riley, who had jumped or fallen to the north side.

The Court of Civil Appeals correctly held there was no evidence to support the finding of the jury that the car of piling was overloaded.

Realizing the want of proof of any negligence proximately causing Riley's injuries, the Court of Civil Ap-

peals was forced to resort to the doctrine of *res ipsa loquitur* to affirm the judgment of the trial court, misinterpreting the holding of the Supreme Court of Texas in the case of *Roberts v. Texas & P. Ry. Co.*, 180 S. W. (2d) 330, as supporting its position, when in fact such case holds directly contrary to the holding of the Court of Civil Appeals in this case\*.

*This application should be granted in order to correct the erroneous holding of the Court of Civil Appeals that there was sufficient evidence to support the findings of the jury of specific acts of negligence proximately causing Riley's death and that the doctrine of *res ipsa loquitur* is applicable.*

Under the undisputed evidence, Riley was the most experienced man on the job and was taking the lead in unloading the piling. Indisputably, if there was any negligence on the occasion in question, causing Riley's injuries, it was bound to have been Riley's own negligence and there is no evidence to support the finding of the jury that Riley was not guilty of contributory negligence at least.

Regardless of whether or not such contributory negligence be taken into consideration, the verdict of the jury and judgment for Thirty Thousand and No/100 (\$30,000.00) Dollars is grossly excessive and should not be per-

\* The **Roberts case, supra**, specifically holds: "Specific acts of negligence were pleaded by Roberts, which it was necessary for him to establish in order to make out his case." (Emphasis added.)

mitted to stand. Such sum greatly exceeds the loss of the beneficiaries resulting from being deprived of a reasonable expectation of pecuniary benefits by Riley's death, as it is much more than Riley could reasonably have expected to earn during the remainder of his life expectancy and at the legal rate of interest in Texas, would return more income than deceased was earning during the prime of his life. The reasonable pecuniary value of the nurture, care and education the three minor children would have received from deceased during their minority had deceased lived can not possibly make up the difference when deceased's work kept him away from home while working, and where the jury apportioned to the widow a sum equal to the total of the sums awarded to the three children.

*This application should be granted in order to correct the erroneous holding of the Court of Civil Appeals that there was sufficient evidence to support the Thirty Thousand and No/100 (\$30,000.00) Dollar verdict and judgment.*

### **CONCLUSION**

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue in this cause to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas, and that upon hearing by this Honorable Court the judgment of such Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas, be reversed and that petitioner have such

other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

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